

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HOWARD GUNTER	:	NO. 12-394-4

MEMORANDUM

Bartle, J.

November 5, 2013

Defendants Flying Tigers, Inc., Jay Stout, and Howard Gunter have been charged in a superseding indictment with (1) conspiracy to commit fraud; (2) fraud involving aircraft parts; (3) mail fraud; (4) wire fraud; and (5) aiding and abetting. Flying Tigers and Jay Stout have also been charged with obstruction of justice. See 18 U.S.C. §§ 371, 38(a)(1), 1341, 1343, and 1519. Joel Stout, an alleged co-conspirator, has entered a guilty plea to the original indictment and awaits sentencing. The trial, after several postponements, is now scheduled to begin on January 6, 2014 and is expected to last up to three weeks or more.

Before the court is the second motion of defendant Howard Gunter to sever under Rule 14(a) of the Federal Rules of Criminal Procedure and his motion to continue trial indefinitely.¹ The gravamen of these motions is his extremely

1. Gunter previously moved to sever on the ground that a joint trial would violate his rights under Bruton v. U.S., 391 U.S. 123 (continued...)

poor physical health. Due to the amount of time necessary for counsel to prepare for this complex trial, it is imperative that the court not wait any longer to rule on the pending motion.

Rule 14(a) provides:

If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Unlike mental incompetency, there is no statutory provision related to physical incompetency. See 18 U.S.C.

§ 4241. Any decision to continue a trial due to physical incompetence is a matter within the court's discretion. See United States v. Schaffer, 433 F.2d 928, 930 (5th Cir. 1970); United States v. Reddy, 2003 WL 22339464, *3 (S.D.N.Y. Oct. 14, 2003); United States v. Gambino, 809 F. Supp. 1061, 1077 (S.D.N.Y. 1992).

The factors which courts have considered in exercising that discretion are laid out in United States v. Doran, 328 F. Supp. 1261 (S.D.N.Y. 1971): (1) the medical evidence; (2) the defendant's activities at work or play; (3) the possibility of

1. (...continued)
(1968). The court denied his motion. See USA v. Flying Tigers, Inc. et al., Criminal Action No. 12-394, Doc. # 111 (Mar. 13, 2013). Gunter also moved to dismiss the original indictment because of his extremely poor health. While the court denied his motion, it recognized that the court could take other steps less drastic than dismissal to protect his right to due process and the assistance of counsel under the Fifth and Sixth Amendments. See USA v. Gunter, 2013 U.S. Dist. LEXIS 34888 (E.D. Pa. Mar. 13, 2013).

measures to minimize the risk to defendant's health in subjecting him to a trial; (4) the temporary or permanent character of the physical problem; and (5) the magnitude and seriousness, that is, the public's interest in prosecuting the case. See United States v. Jones, 876 F. Supp. 395 (N.D.N.Y. 1995); United States v. Carollo, 1995 WL 143539 (E.D. La. Mar. 30, 1995).

Gunter, who is in his late seventies, lives in New Bloomfield, Perry County which is more than 100 miles west of Philadelphia. It is undisputed that he has suffered and continues to suffer from a series of acute health conditions. He was discovered to have bladder cancer in 2009 and in 2011 both his kidneys, both ureters, and his bladder were removed. His prostate has also been excised because of cancer. He has no renal function and undergoes dialysis in New Bloomfield three days a week for four and one-half hours per day which is necessary in order to sustain his life. The dialysis causes him difficulty in functioning for the remainder of the day. He now has lung cancer. He also underwent surgery in May, 2013 to remove his left testicle due to complications arising from the surgical removal of his kidneys. In addition to his other problems, he suffers from hypertension. According to his wife's affidavit, he has a severe hearing impairment despite use of hearing aids, and he sleeps excessively. Recently his physician, Lewis E. Harpster, M.D., Associate Professor of Surgery, Division of Urology at the Hershey Medical Center wrote about his deteriorating condition:

Mr. Gunter has had a cystectomy, prostatectomy, and bilateral nephroureterectomies and is on dialysis three times per week. He is having severe blood pressure fluctuations which are being monitored closely by his nephrologist.

At this time Mr. Gunter has developed pulmonary metastasis of his urothelial carcinoma. He is being seen by medical oncology for possible salvage adjuvant therapy. Unfortunately, his prognosis is not good and many patients with this level of advanced disease succumb within one to two years.

The medical evidence clearly demonstrates an ill defendant who could not sit through a trial conducted on a daily basis, if nothing else because of his need for dialysis.

Gunter is retired. We have no information that he engages in any outside activity except to undergo dialysis and visit his physicians.

We must also consider what measures might be taken to minimize the risk to defendant's health in subjecting him to a trial. It is difficult to imagine any realistic court schedule to accommodate Gunter with his health needs. As noted above, he is undergoing dialysis three days a week. Without dialysis, he would not survive. During this time and for the remainder of the day he is unavailable for trial and unable to assist his counsel with his defense. Reducing the trial, for example, to three days a week would not in our view be practical in light of his other serious health issues enumerated above. Gunter is represented by the Public Defender. It would also be unfairly burdensome to require him to alter his routine to arrange for dialysis in

Philadelphia and to stay here for this lengthy trial. If Gunter is tried with the other two defendants, the trial will take close to twice as long as the presently anticipated three weeks or more. A significant extension of the trial schedule would unfairly increase the expense for the other two defendants. Severing Gunter's case and transferring it to the Middle District of Pennsylvania as suggested by the Government is an expensive and cumbersome option not in the interest of justice or the current state of the budget. Among other things, his court appointed counsel, as well as the Assistant United States Attorney, would have to travel from Philadelphia to Harrisburg. See United States v. Flying Tigers, Inc., 2013 U.S. Dist. LEXIS 78550, *5 (E.D. Pa. Jun. 4, 2013).

Gunter's health problems appear to be permanent. While one always hopes for the best, his medical prognosis unfortunately is poor and not likely to improve.

The final factor we need to consider under Doran is the public interest in prosecuting the case. While the fraud charges against him are serious, there are crimes of greater magnitude in the lexicon of federal offenses. Nonetheless, this factor weighs in favor of denying Gunter's motion.

Considering all the relevant factors set forth in Doran, we find that Gunter is currently physically incompetent to stand trial which is now scheduled for January 6, 2014. If his trial went forward, his life, due to his seriously deteriorating health, would be at significant risk, and he would have extreme

difficulty in effectively assisting his counsel and presenting an effective defense. Justice requires that we grant his second motion to sever his trial from that of defendants Flying Tigers, Inc. and Jay Stout and to grant his motion to continue his trial until further order of court. See Fed. R. Crim. P. 14(a). If the Government wishes to have a full medical examination of Gunter at its own expense, it may file a motion to this effect.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HOWARD GUNTER	:	NO. 12-394-4

ORDER

AND NOW, this 5th day of November, 2013, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the second motion of Howard Gunter to sever his trial from that of defendants Flying Tigers, Inc. and Jay Stout (Doc. #133) is GRANTED; and

(2) the motion of Howard Gunter to continue his trial (Doc. #133) is GRANTED until further order of court without prejudice to the right of the Government to move for a full medical examination of him at its own expense.

BY THE COURT:

/s/ Harvey Bartle III

J.